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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CARLOS VICTORINO and ADAM
12 TAVITIAN, individually, and on behalf of
13 other members of the general public
similarly situated,

14 Plaintiffs,

15 v.

16 FCA US LLC, a Delaware limited
17 liability company, ,

18 Defendant.

Case No.: 16cv1617-GPC(JLB)

**ORDER DENYING PLAINTIFFS'
AMENDED MOTION TO EXCLUDE
OR LIMIT EXPERT TESTIMONY
OF ROBERT BENSON AND MIKE
ROYEK**

[Dkt. No. 218.]

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20 Before the Court is Plaintiffs' amended motion to exclude or limit the expert
21 testimony of Robert Benson and Mike Royek. (Dkt. No. 218.) Defendant filed an
22 opposition on April 27, 2018. (Dkt. No. 228.) Plaintiffs filed their reply on May 4, 2018.
23 (Dkt. No. 237.) The Court finds that the matter is appropriate for decision without oral
24 argument pursuant to Local Civ. R. 7.1(d)(1). Based on the reasoning below, the Court
25 DENIES Plaintiffs' motion to exclude.

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1 **I. Background**

2 In their amended motion for class certification, Plaintiffs Carlos Victorino
3 (“Victorino”) and Adam Tavitian (“Tavitian”) (collectively “Plaintiffs”) specifically
4 claim a design defect in the 2013-2015 Dodge Dart vehicles equipped with a Fiat C635
5 manual transmission built on or before November 12, 2014 (“Class Vehicles”) by
6 Defendant FCA US LLC (“Defendant” or “FCA”). (Dkt. No. 215-1 at 6.) Plaintiffs
7 assert that their vehicles’ clutches fail and stick to the floor which causes their vehicles to
8 stall, fail to accelerate, and results in “premature failure of the transmission’s
9 components, including, but not limited to, the clutch master cylinder and reservoir hose,
10 clutch slave cylinder and release bearing, clutch disc, pressure plate, and flywheel.”
11 (Dkt. No. 104, FAC ¶ 2.)

12 Robert Benson and Mike Royek are employees of FCA and were designated as
13 non-retained experts on November 8, 2017. Plaintiffs move to exclude their expert
14 testimony under Rule 702 contending that their opinions are not reliable or relevant.
15 Specifically, they contend that despite their qualifications, they do not demonstrate the
16 methodology used to arrive at their opinions. They also demonstrate ignorance as to the
17 underlying facts of the case indicating that their opinions are biased and reflect the self-
18 interest in supporting facts favorable to FCA. Plaintiffs argue there is a risk of prejudice
19 to them if Benson and Royek are presented as “experts” and move to exclude their
20 testimonies as experts and seek to have them admitted as lay opinion testimony.

21 **II. Analysis**

22 **A. Daubert Legal Standard**

23 The trial judge must act as the gatekeeper for expert testimony by carefully applying
24 Federal Rule of Evidence (“Rule”) 702 to ensure specialized and technical evidence is “not
25 only relevant, but reliable.” Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 589 &
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1 n.7 (1993); accord Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 147 (1999) (Daubert
2 imposed a special “gatekeeping obligation” on trial judges).

3 Under Rule 702, a witness “qualified as an expert by knowledge, skill, experience,
4 training, or education, may testify” . . . if “(a) the expert’s scientific, technical, or other
5 specialized knowledge will help the trier of fact to understand the evidence or to determine
6 a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the
7 product of reliable principles and methods; and (d) the expert has reliably applied the
8 principles and methods to the facts of the case.” Fed. R. Evid. 702. The proponent of the
9 evidence bears the burden of proving the expert’s testimony satisfies Rule 702. Lust By &
10 Through Lust v. Merrell Dow Pharm., Inc., 89 F.3d 594, 598 (9th Cir. 1996).

11 In applying Rule 702, the Ninth Circuit “contemplates a broad conception of expert
12 qualifications.” Hangerter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1015 (9th
13 Cir. 2004) (quoting Thomas v. Newton Int’l Enters., 42 F.3d 1266, 1269 (9th Cir. 1994)).
14 “Shaky but admissible evidence is to be attacked by cross examination, contrary evidence,
15 and attention to the burden of proof, not exclusion.” Primiano v. Cook, 598 F.3d 558, 564
16 (9th Cir. 2010) (citing Daubert, 509 U.S.at 596).

17 However, the district court must act as a gatekeeper to exclude “junk science.”
18 Messick v. Novartis Pharms. Corp., 747 F.3d 1193, 1199 (9th Cir. 2014); Ellis v. Costco
19 Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) (“Under Daubert, the trial court must
20 act as a “gatekeeper” to exclude junk science that does not meet Federal Rule of Evidence
21 702’s reliability standards by making a preliminary determination that the expert’s
22 testimony is reliable.”).

23 Under Daubert, scientific evidence must be both reliable and relevant. Daubert, 509
24 U.S. at 590-91. Scientific evidence is reliable “if the principles and methodology used by
25 an expert are grounded in the methods of science.” Clausen v. M/V New Carissa, 339 F.3d
26 1049, 1056 (9th Cir. 2003). The focus of the district court’s analysis “must be solely on
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1 principles and methodology, not on the conclusions that they generate.” Daubert, 509 U.S.
2 at 595. “[T]he test under Daubert is not the correctness of the expert’s conclusions but the
3 soundness of his methodology.” Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311,
4 1318 (9th Cir. 1995) (“Daubert II”). Second, the proposed expert testimony must be
5 “relevant to the task at hand,” meaning that it “logically advances a material aspect of the
6 proposing party’s case.” Daubert, 509 U.S. at 597.

7 As one Ninth Circuit court simply stated, the test is “whether or not the reasoning is
8 scientific and will assist the jury. If it satisfies these two requirements, then it is a matter
9 for the finder of fact to decide what weight to accord the expert’s testimony.” Kennedy v.
10 Collagen Corp., 161 F.3d 1226, 1231 (9th Cir. 1998). “Disputes as to the strength of [an
11 expert’s] credentials, faults in his use of [a particular] methodology, or lack of textual
12 authority for his opinion, go to the weight, not the admissibility, of his testimony.” Id.
13 (quoting McCulloch v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995)).

14 **B. Motion to Exclude Mr. Benson**

15 Benson is an employee of FCA and a Senior Manager-Manual Trans, 4WD System
16 & Driveline Engineering. (Dkt. No. 157, Benson Decl. ¶ 3.) He was deposed by Plaintiffs’
17 counsel as FCA’s corporate designee around September 17, 2017. On November 22, 2017,
18 FCA designated Benson as a non-retained expert witness. (Dkt. No. 171-1, Wallace Decl.,
19 Ex. A at 4-5.) The designation stated that Benson would testify about the following,

20
21 the function and operation of clutch system components in model-year 2013-
22 2015 Dodge Dart vehicles equipped with a manual transmission; the design,
23 development and testing of the various clutch system components as
24 disclosed in records produced by FCA US; a voluntary customer service
25 action, known internally as CSN x62, to address an issue with leaching
26 plasticizer in the reservoir hose component in some model-year 2013-2015
27 Dodge Dart vehicles; warranty repairs; and, clutch system component abuse
28 and wear.

1 (Id. at 5.) Moreover, Benson will also testify on “the effects of leaching plasticizer on
2 various components within the clutch system of model-year 2013-2015 Dodge Dart
3 vehicles; the effectiveness of the repair procedure developed in connection with
4 CSN x62; driver abuse and wear of clutch system components; and, materials used in
5 slave cylinder construction.” (Id.)

6 Plaintiffs seek to exclude Benson’s opinion as an expert and instead seek to have
7 him testify as a lay witness.¹ They summarily argue that Benson’s opinion is not reliable
8 or relevant. They argue that he merely regurgitates the arguments FCA has set forth in
9 this litigation and fails to lay the foundation or methodology for any opinions, tests,
10 determinations and observations. FCA disagrees arguing that Plaintiffs seek to
11 improperly exclude “facts” not opinion testimony and Benson is qualified to offer
12 opinion testimony as he has direct and first-hand knowledge of the design and operation
13 of the specific components at issue as he was the person who was in charge of overseeing
14 its design and development and has sufficient foundation to opine.

15 Benson has two Bachelor of Science degrees in Manufacturing System
16 Engineering and Mechanical Engineering and a Master’s Degree in Automotive
17 Engineering. (Dkt. No. 229-1, Benson Decl. ¶ 2.) He is currently Senior Manager-
18 Manual Trans, 4WD System & Driveline Engineering and has been employed with FCA
19 since June 2009. (Dkt. No. 157, Benson Decl. ¶ 3.) This group of engineers was
20 responsible for the clutch hydraulic release system in model-year 2013-2015 Dodge Dart
21 Vehicles. (Id.) He was Senior Manager in this group prior to the launch of model-year
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23 ¹ As non-retained experts, Mr. Benson and Mr. Royek did not file expert reports. In seeking to exclude
24 Mr. Benson’s opinion, Plaintiffs rely on Benson’s declarations filed to date in this case which include
25 his declaration in support of FCA’s opposition to class certification filed on November 30, 2017, (Dkt.
26 No. 157, Benson Decl.), and in support of Defendant’s motion for summary judgment filed on
27 November 6, 2017. (Dkt. No. 151-18, Benson Decl.) In its opposition to the amended motion for class
28 certification, FCA submitted an updated version of Benson’s declaration to address remaining issues in
the case which Plaintiffs do not object to and the Court relies on. (Dkt. No. 229-1, Benson Decl.)

1 2013 Dodge Dart vehicles and currently remains in that position. (Id.) From 1995 until
2 June 2009 Benson was employed by FCA’s predecessor, Chrysler LLC, in various
3 positions such as Supervisor, Resident Engineer, and Product Engineer. (Id.) He has
4 over 23 years of professional experience working on vehicle transmissions and related
5 clutch hydraulic release system components. (Id.) Benson has personal knowledge about
6 the design and operation of the components at issue, about the testing that was conducted
7 on these components as well as the results of the testing. (Id. ¶ 4.) He is also familiar
8 with the facts in the case through his work on it. (Id.)

9 The United States Supreme Court has distinguished between cases where expert
10 testimony will rest upon scientific foundations and in other cases where expert testimony
11 is based on personal knowledge or experience. Kumho Tire Co., Ltd. v. Carmichael, 526
12 U.S. 137, 150 (1999) (“Engineering testimony rests upon scientific foundations, the
13 reliability of which will be at issue in some cases In other cases, the relevant
14 reliability concerns may focus upon personal knowledge or experience.”); United States
15 v. Hankey, 203 F.3d 1160, 1169 (9th Cir. 2000) (“The Daubert factors (peer review,
16 publication, potential error rate, etc.) simply are not applicable to this kind of testimony,
17 whose reliability depends heavily on the knowledge and experience of the expert, rather
18 than the methodology or theory behind it.”). Therefore, an expert’s experience, training
19 and education can provide a sufficient foundation for reliability. See Hangarter v.
20 Provident Life and Accidental Ins. Co., 373 F.3d 998, 1018 (9th Cir. 2004). Rule 702
21 also provides that an expert may be qualified by “knowledge, skill, experience, training,
22 or education” as long as the specialized knowledge will help the trier of fact to understand the
23 evidence or to determine a fact in issue.” Fed. R. Civ. P. 702.

24 Expert testimony is admissible under Rule 702 if the “subject matter at issue is beyond
25 the common knowledge of the average layman” United States v. Morales, 108 F.3d
26 1031, 1038 (9th Cir. 1997).

1 One Ninth Circuit court noted, “[w]here, as here, the experts’ opinions are not the
2 “junk science” Rule 702 was meant to exclude . . . the interests of justice favor leaving
3 difficult issues in the hands of the jury and relying on the safeguards of the adversary
4 system-‘[v]igorous cross-examination, presentation of contrary evidence, and careful
5 instruction on the burden of proof’- to ‘attack[] shaky but admissible evidence’”
6 Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227, 1237 (9th Cir. 2017) (internal
7 citations omitted).

8 Here, Mr. Benson was Senior Manager of the group responsible for the clutch
9 hydraulic release system in the 2013-2015 model year Dodge Dart vehicles prior to their
10 launch and has remained in that position. (Dkt. No. 229-1, Benson Decl. ¶ 3.) He
11 oversaw Defendant’s development, investigation and testing efforts that are described in
12 his declaration. (Id.) He has over 23 years of experience working on vehicle
13 transmissions and related clutch hydraulic release systems components. (Id.) He states
14 that he has personal knowledge about the design and operation of the components at issue
15 in the model year 2013-2015 Dodge Dart vehicles that were built on or before November
16 12, 2014 that are equipped with a Fiat C635 manual transmission. (Id. at 4.) He also has
17 personal knowledge about the testing that was performed on the components at issue and
18 the results of the testing. (Id.) Benson’s personal experience with the design and
19 operation of the specific technology at issue, and the specific model years at issue as well
20 as the testing that was performed prior to the X62 Extended Warranty provide the
21 foundation of Benson’s expert opinion. Moreover, this specialized knowledge will assist
22 the trier of fact on the issues in this case. Finally, any disagreement with Benson’s
23 conclusions² or any bias goes to the weight of the testimony, not to its admissibility and
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27 ² For example, in challenging Benson and Royek’s opinion, Plaintiffs argue that Defendants FCA still
28 fails to address that neither Benson or Royek recognize the clutch system’s fundamental flaw or applied

1 may be challenged at trial. Accordingly, the Court DENIES Plaintiffs’ motion to exclude
2 the testimony of Mr. Benson.

3 **C. Motion to Exclude Mike Royek**

4 On November 22, 2017, FCA designated Royek as a non-retained expert witness.
5 (Dkt. No. 171-1, Wallace Decl., Ex. A.) Royek is a Senior Specialist – Product
6 Investigations at FCA and will testify about “the conditions found upon inspection of
7 Plaintiffs’ vehicles” and “the clutch system operation of Plaintiffs’ vehicles at the time of
8 his inspections.” (Id. at 5-6.) He has worked at FCA since June 2009 and before that he
9 was employed by Chrysler LLC and its predecessors in various positions from 1984 to
10 June 2009 including those involving the analysis of hydraulic clutch release system
11 components. (Dkt. No. 229-23, Royek Decl. ¶ 2.) During the course of his employment,
12 he has become familiar with the design and operation of the model years 2013-2015
13 Dodge Dart vehicles and the Fiat C635 manual transmission. (Id. ¶ 3.) This includes the
14 function and operation of the components, both individually and collectively, that make
15 up the hydraulic clutch release system and the clutch assembly used in connection with
16 the Fiat C635 manual transmissions. (Id.)

17 On May 24, 2017 and March 20, 2018, Royek conducted in-person inspections of
18 Victorino’s Dodge Dart Vehicle. (Id. ¶¶ 4, 7.) He also conducted an in-person inspection
19 of Tavitian’s model-year 2013 Dodge Dart vehicle on August 16 and 17, 2016. (Id. ¶
20 11.)

21 Plaintiffs seek to exclude Royek’s testimony arguing there is no foundation for his
22 conclusions. They claim his declaration is perfunctory and offers nothing requiring
23 special knowledge or expertise to assist the trier of fact. It is asserted that Royek’s
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26 the correct industry standard to subsequent attempts to resolve the issue. (Dkt. No. 237 at 5.) They
27 challenge Benson and Royek’s failure to address conclusions propounded by them.

1 inspection of Plaintiffs' vehicles are both cursory and conclusory because it was merely a
2 visual inspection. Further, the observations and inferences are based on insufficient data
3 and no methodology and therefore, they lack relevance and reliability. Defendant asserts
4 that Royek has more than 30 years of industry experience and is an investigator and
5 Senior Specialist in Defendant's Product Analysis group and has direct personal
6 experience with the system and components at issue. He provides testimony about his
7 own background and experience and his personal observations and conclusions during
8 the inspection of Victorino and Tavitians' vehicle inspections.

9 Plaintiffs' citation to Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843,
10 (9th Cir. 2014) is not persuasive. Ollier dealt with Title IX where the defense sought to
11 introduce the proposed testimony of a retired superintendent of a different school district
12 who would have testified about the "the finances of schools and high school athletic
13 programs, as well as equitable access to school facilities at Castle Park" and the district
14 court excluded his testimony finding that the opinion was based on his personal opinions
15 and speculation rather than an systematic assessment of athletic facilities and program.
16 Id. at 860. His in-person inspection was described as superficial as he only walked the
17 softball and baseball fields when it was not in season and concluded the softball field was
18 in excellent shape. Id. While he opined about renovations to the softball field, he did not
19 enter the softball or baseball dugouts or batting cages. Id. at 860-61. The district court
20 also excluded the proposed expert testimony of an assistant principal at a different high
21 school who would testify about the "unique nature of high school softball and its role at
22 Castle Park" as speculative and inherently unreliable and unsupported by the facts. Id.
23 She was a former softball coach and proposed as an expert on all aspects of softball. Id.
24 at 861. Her on-site visit was also cursory. Id. While she toured the softball and baseball
25 fields and the locker rooms and was present while a baseball and softball game were
26 being played, she observed the playing services, dugout areas, field condition, fencing,
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1 bleachers, and amenities from afar. Id. The Ninth Circuit held that the district court did
2 not abuse its discretion in excluding these expert testimonies. Id.

3 Here, in contrast, Royek’s in-person inspection was not merely visual. First,
4 Royek has specific personal experience with the design and operation of the Class
5 Vehicles and has been involved with analyzing hydraulic clutch release system
6 components. He conducted an in-person inspection of Victorino’s vehicle twice on May
7 24, 2017 and March 20, 2018 which included a test drive and a careful inspection for him
8 to conclude that “there was an oil leak coming from the oil reservoir”, (Dkt. No. 229-23,
9 Royek Decl. ¶ 5), that the CMC and reservoir hose were the original, manufacturer-
10 installed components, (id. ¶ 9), and that there “were no signs or evidence of any excessive
11 swelling or other problem with the seals in the clutch master cylinder, (id. ¶ 10). Royek
12 also conducted an inspection of Tavitian’s vehicle which was not as detailed because the
13 dealership replaced the clutch master cylinder and reservoir hose and those parts were
14 confirmed to be operational. (Id. ¶ 14.) The Court concludes his testimony is relevant, as
15 it will assist the trier of fact on the issues in this case and is reliable as his opinions are
16 based on his knowledge, skill, experience, and training with working on the Class
17 Vehicles.

18 Plaintiffs essentially disagree as to Royek’s conclusion about the driving habits of
19 Victorino and Tavitian; however, any challenges to Royek’s conclusions can be challenge
20 on cross-examination. See Daubert, 509 U.S. at 595. Accordingly, the Court DENIES
21 Plaintiffs’ motion to exclude the expert testimony of Mike Royek.

22 **D. Request for Judicial Notice**

23 Plaintiffs filed a request for judicial notice of two articles, “Reference Guide on
24 Estimation of Economic Damages,” *Reference Manual on Scientific Evidence, Third*
25 *Edition*, Federal Judicial Center (2001) and “Reference Guide on Engineering,” *Reference*
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1 *Manual on Scientific Evidence, Third Edition*, Federal Judicial Center 2011). (Dkt. No.
2 218-1.) Defendant objects to the request for judicial notice. (Dkt. No. 228-4.)

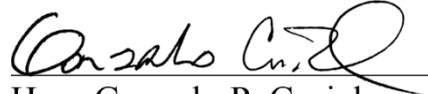
3 Judicial notice is available only if the particular “fact” is “not subject to reasonable
4 dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or
5 (2) can be accurately and readily determined from sources whose accuracy cannot
6 reasonably be questioned.” Fed. R. Evid. 201(a). Here, Defendant argues that Plaintiffs
7 never identify what “facts” from the articles they want the court to take judicial notice and
8 the alleged facts are subject to reasonable dispute. Because the Court agrees with the
9 position of the Defendant, the Court DENIES Plaintiffs’ request for judicial notice.

10 **Conclusion**

11 Based on the above, the Court DENIES Plaintiffs’ amended motion to exclude or
12 limit the expert opinions of Robert Benson and Mike Royek.

13 IT IS SO ORDERED.

14 Dated: June 4, 2018

15 
16 Hon. Gonzalo P. Curiel
United States District Judge